IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10713 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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DINKARRAY SHANKERLAL DAVE

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10713 of 1994

MRS VASAVDATTA BHATT for Petitioner No. 1-12

MR BY MANKAD, AGP for Respondent No. 1

MR SN SHELAT for Respondent No. 2

MR MG NAGARKAR for Respondent No. 3

CORAM : MR.JUSTICE K.M.MEHTA

Date of decision: 18/02/2002

ORAL JUDGEMENT

1. Dinkarray Shankerlal Dave and others, petitioners have filed this petition with a prayer that the

respondent Ahmedabad Municipal Corporation be directed to consider the claim of the petitioners and permit them to join the pensionary scheme with a further direction to extend benefits of pension scheme available to school teachers in this behalf. The said petition was filed somewhere in August 1994.

2. The facts giving rise to this petition are as under:-

2.1 The petitioners who have retired as Primary Teachers were working in the different schools under the management and control of the respondents No.2 and 3 during the period between 1940 to 1960 of the Ahmedabad Municipal Corporation. The service details of all the petitioners are as per the statement at Annexure `A' to the petition. It is stated that during that period only Contributory Provident Fund Scheme was existing there was no pension scheme at that time. It has been stated that in the year 1960 the pension scheme came into force and, therefore, the teachers who had joined the services prior to 1960 made representations to the respondent No.3 for giving option for joining the pension scheme and to exercise option was extended upto 1.4.1978. The Corporation also made a distinction that the teachers who have retired before 1.2.1978 are not eligible to exercise their option.

2.2 It has been stated some of the retired employees had filed Special Civil Application being SCA No.3684/83 and 1349/88 before this Court. It has also been stated that some of the employees had also filed Special Civil Application No.2119 of 1992 before this Court.

2.3 As regards Special Civil Application No.2119 of 1992, this Court (Coram: J.M.Panchal, J.) by his judgment and order dated 4th May, 1994, pleased to allow the petition. The learned Judge has relied upon the earlier judgment in Special Civil Application No.3684 of 1983 and others and has also relied upon the resolutions as well as circulars passed by the Corporation. The learned Single Judge has also considered the judgment of the Hon'ble Apex Court in the case of All India Reserve Bank Retired Officers' Association and others vs. Union of India and others reported in AIR 1992 SC 767 and in para 8 the Court has observed as under and allowed the petition.

"In the present case, the benefit of pension scheme is already accorded to the retired teachers who were in service prior to 1983 vide

Circular No.337 and, therefore, the decision rendered in the said case would not be applicable to the facts of the present case."

3. On behalf of the Corporation, an affidavit has been filed by Shri Umakant C.Tripathi, Administrative Officer working in the Ahmedabad Municipal School Board dated 29th March, 2000, and stated that the pension scheme for teaching staff of the school boards came into existence in or about 1960 but the same was optional and the Corporation has informed the teachers to exercise that option. However, inspite of the options given earlier, the petitioners who were in service till the time limit prescribed for exercising option but did not opt for pension scheme. It was also stated that the said benefit of pension scheme for exercising option given to the said employees was further extended by the Municipal Commissioner's Circular dated 4.3.1987 upto 30.4.1987. It was also stated that pursuant to the said Circular the authority has also informed the employees who had joined the service of the Corporation before 1983 and were in C.P.F. scheme that they were afforded the last chance of exercising option to join the pension scheme which they were required to exercise upto 30.4.87 and that the applications received thereafter will not be entertained.

4. Learned advocate for the respondent Mr.Nagarkar has pointed out that against the aforesaid judgment of the learned Single Judge, appeal was filed being Letters Patent Appeal No.83 of 1995 before the Division Bench of this Court and the Division Bench of this Court has allowed the Letters Patent Appeal and set aside the order of the learned Single Judge in this behalf.

5. As regards legal aspect, after relying upon the Division Bench judgment of this Court decided in Letters Patent Appeal No.83 of 1995, the Division Bench of this Court has quashed and set aside the judgment of the learned Single Judge in this behalf.

6. Ms.Vasavdatta Bhatt, learned advocate for the petitioner has relied upon the recent judgment of the Hon'ble Supreme Court in the case of V.Kasturi Vs. Managing Director, SBI Bombay and others reported in AIR 1999 SC 81 where in para 21 and 22 the Hon'ble Supreme Court has considered the principle on which pension is to be given which reads as under:

"Para.21 If the person retiring is eligible for pension at the time of his retirement and if he survives till the time by subsequent amendment of

the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per the new formula of computation of pension subsequently brought into force, he would be entitled to get the benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when the additional benefit is being conferred on all of them. In such a situation the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners who had survived by the time the scheme granting additional benefit to these pensioners came into force. The line of decisions tracing their roots to the ratio of Nakara's case (AIR 1983 SC 130) (supra) would cover this category of cases.

Para 22. However, if an employee at the time of his retirement is not eligible for earning pension and stands outside the class of pensioners, if subsequently by amendment of relevant pension Rules any beneficial umbrella of pension scheme is extended to cover a new class of pensioners and when such a subsequent scheme comes into force the erstwhile non-pensioner might have survived, then only if such extension of pension scheme to erstwhile non-pensioners is expressly made retrospective by the authorities promulgating such scheme; the erstwhile non-pensioner who has retired prior to the advent of such extended pension scheme can claim benefit of such a new extended pension scheme. If such new scheme is prospective only, old retirees non-pensioners cannot get the benefit of such a scheme even if they survive such new scheme. They will remain outside its sweep."

6.1 Learned advocate for the petitioner has relied upon the recent judgment of the Hon'ble Apex Court in the case of Subrata Sen and another vs. Union of India and others reported in (2001) 8 SCC 71. In that case after referring the Nakara's case in para 14 the Court has observed as under:

"In our view the aforesaid para does not in any way support the contention of the respondents. On the contrary, on parity of reasoning, we would

also reiterate that let us be clear about this misconception. Firstly, the Pension Scheme including the liberalised scheme available to the employees is non-contributory in character. Payment of pension does not depend upon Pension Fund. It is the liability undertaken by the Company under the Rules and whenever becomes due and payable, is to be paid. As observed in Nakara case pension is neither a bounty, nor a matter of grace depending upon the sweet will of the employer, nor an ex gratia payment. It is a payment for the past services rendered. It is a social welfare measure rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in the lurch. Maybe that in the present case, the trust for Pension Fund is created for income tax purposes or for smooth payment of pension, but that would not affect the liability of the employer to pay monthly pension calculated as per the Rules on retirement from service and this retirement benefit is not based on availability of Pension Fund. There is no question of pensioners dividing the Pension Fund or affecting the pro rata share on addition of new members to the Scheme. As per Rule 1 quoted above, an employee would become a member of the Fund as soon as he enters into a specified category of service of the Company. Under Rule 8, trustees may withhold or discontinue a pension or annuity or any part thereof payable to a member or his dependants, and that pension amount is non-assignable. Further, the payment of pension was the liability of the employer as per the Rules and that liability is required to be discharged by the Union of India in lieu of its taking over of the Company. The rights of the employees (including retired) are protected under Section 11 of the Burmah Oil Company [Acquisition of Shares of Oil India Limited and of the Undertakings in India of Assam Oil Company Limited and the Burmah Oil Company (India Trading) Limited] Act, 1981.

6.1(A) Thereafter the Apex Court has referred the case of All India Reserve Bank Retired Officers Assn.vs. Union of India and ultimately in para 19 the Court has observed as under:

"Same is the position in the present case. As

> observed in the aforesaid case, in case of an employee governed under the Pension Scheme, relations with the employer merely undergo a change, but are not snapped altogether. There is no new scheme of payment of pension, but it is only a revision of the existing Pension Scheme. Under the new Pension Scheme, pension is required to be paid on the basis of 40 per cent of the average of the last 10 months' salary including average dearness allowance drawn by the officer over the last 10 months of his service instead of earlier 40 per cent of the average annual basic salary for the last five years of service immediately preceding the date of retirement."

7. In my view it is no doubt true that the original petitioner has relied upon the order of the learned Single Judge which has been set aside by the Division Bench of this Court, however, in view of the judgment of the Hon'ble Supreme Court in V.Kasturi's case (supra) and Subrata Sen's case (supra) which has laid down the principle of regarding payment of compensation. In my view if the employees are allowed to make suitable representation before the Corporation including contention raised by the petitioner which has been set out in the petition as well as other representations within one month from today and the Corporation thereafter considered the said representation in light of the recent judgment of the Hon'ble Supreme Court in V.Kasturi's case and Subrata Sen's case and then allow the petitioner to be heard in person or their representative and thereafter the Corporation may pass a short but speaking order regarding pension the same will be in the interest of justice. The petitioner will make representation by 30th July, 2002, and the Corporation will decide the same by 15th September, 2002.

8. In view of the aforesaid directions, the petition is disposed of with no order as to costs. Rule is discharged.

(K.M. Mehta, J.)

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